A

KESANG LEASING SDN BHD

v.

DATO' HJ MAT AHMAD & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
MOHD HISHAMUDIN YUNUS J
[CIVIL SUIT NO: S3-22-193-96]
28 OCTOBER 2008

C ***CIVIL PROCEDURE:*** *Trial - Reopening of case - Interlocutory application - Delay in filing application - Whether satisfactory explanation furnished - Whether first defendant showed lack of interest to proceed with action - Absent during several court proceedings - Whether medical certificate submitted wanting and unacceptable - Whether application* D *should be dismissed*

This was an interlocutory application (encl. 105) by the first defendant by summons in chambers seeking an order that the first defendant be allowed to cross examine the plaintiff's sole witness at the trial. The plaintiff's claim against the first defendant was for E damages for breach of fiduciary duty as a director of the plaintiff company. However, while the trial was ongoing, the first defendant was adjudged a bankrupt. The plaintiff applied for and obtained leave of the Bankruptcy Court to proceed against the first defendant pursuant to s. 8(1) Bankruptcy Act 1967. When F the case was called up for continued hearing, counsel for the first defendant submitted that the first defendant had applied to the Director General of Insolvency for sanction pursuant to s. 38(1)(a) of the Bankruptcy Act to defend the action. Subsequently, on 13 September 2007, the Senior Federal Counsel G (representing the Director General of Insolvency) appearing as *amicus curiae* on behalf of the first defendant applied for an adjournment. The application for adjournment was disallowed. The Senior Federal Counsel informed the court that he was in no position to proceed with the defence as the first defendant was H on medical leave and that he had no other witnesses. Under the circumstances, the trial was deemed concluded and the court issued directions for the filing and serving of written submissions and fixed 4 February 2008 as the date of decision. On 4 February 2008, the court did not deliver its decision because on I that day, at the commencement of the proceeding, the first defendant informed the court that the receiving and adjudicating

order against the first defendant had been annulled by the Bankruptcy Court on 15 November 2007 and that the first defendant now wished to apply to reopen the case, to cross examine the plaintiff's witness and thereafter to present the defendant's case.

Held (dismissing application with costs):

(1) Although the defence closed its case on 13 September 2007 and the first defendant ceased to be a bankrupt on 15 November 2007, yet the present application was not made by the first defendant promptly; it was not made until 17 April 2008 when the present application was filed. No satisfactory explanation was furnished by the first defendant for this long delay in filing encl. 105. (para 15)

(2) The Senior Federal Counsel, representing the Director General of Insolvency, had informed the court that he was unable to proceed with the trial as the first defendant had not been cooperative and had never presented himself as the Senior Federal Counsel's office to discuss the case. The first defendant had shown no interest to proceed with the action. He was absent on 13 September 2007 without a valid reason. (paras 17 & 18)

(3) The medical certificate submitted by the defendant was wanting and hence unacceptable because (i) the medical certificate was not clear as to the nature of the first defendant's alleged illness; (ii) the doctor who issued the medical certificate was not called to explain as to why the first defendant was unfit to attend court; (iii) the medical certificate itself did not say that the first defendant was not fit to attend court; (iv) the medical certificate was ambiguous. (paras 18 & 19)

(4) It was not only on this date (13 September 2007) that the first defendant failed to attend trial without valid reason. Previously the first defendant had absented himself from court on three occasions without valid reason, although in respect of each of the occasions he had been previously informed in writing by the court to attend the court proceedings. (para 23)

[On 10 October 2008, counsel for the first defendant was allowed to file and serve written submission on the trial as a whole, and decision on the whole trial would be delivered on 9 January 2009.]

A **Case(s) referred to:**
Tan Kah Kiam v. Liew Chin Chuan & Anor [2006] 4 CLJ 715 CA ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 8(1), 38(1)(a)

B *For the plaintiff - S Shamalah; M/s De Silva*
For the 1st defendant - Deepinder Kaur; M/s David Lingam & Co

Reported by Suhainah Wahiduddin

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JUDGMENT

Mohd Hishamudin Yunus J:

[1] Enclosure 105 is an interlocutory application by the 1st
D defendant by summons in chambers seeking an order that the 1st defendant be allowed to cross-examine the plaintiff's sole witness at the trial.

[2] I have dismissed the application with costs.

E

[3] In the present civil suit, the plaintiff's claim at the present moment is only against the 1st defendant. The plaintiff's claims against the 2nd, 3rd and 4th defendants have previously been withdrawn.

F **[4]** The plaintiff's claim against the 1st defendant is for damages for breach of fiduciary duty as a director of the plaintiff company.

[5] The trial of the present case began on 21 March 2005. However, while the trial was still ongoing, the 1st defendant was
G adjudged a bankrupt on 11 July 2005. The plaintiff applied for and obtained leave of the Bankruptcy Court on 23 January 2007 to proceed against the 1st defendant pursuant to s. 8(1) of the Bankruptcy Act 1967. On 30 March 2007 when the case was called up for continued hearing, with the officer from the office of
H the Director General of Insolvency being present as well at the trial, a counsel, Mr. David Lingam informed the court that he had been engaged by the 1st defendant to represent him and that the 1st defendant had applied to the Director General of Insolvency for sanction pursuant to s. 38(1)(a) of the Bankruptcy Act to
I defend the action and to retain Messrs David Lingam & Co as his solicitors and Mr. David Lingam as his counsel. The case was

then adjourned to 2 July 2007 for the court to make a ruling on a point of law (for the purpose of the present application it is unnecessary for me to state here what the point of law is). However, on 2 July 2007, the court having made the ruling, directed that the continuation of the trial be held on 13 September 2007; and that if by that date no sanction of the Director General of Insolvency was obtained by the 1st defendant, then the court will proceed with the trial with the Director General of Insolvency as the defendant, and that, if the Director General of Insolvency on that date was desirous of defending the action, he ought to be ready to proceed with the trial.

[6] Now, on 13 September 2007 both the Senior Federal Counsel (Encik Zahari Mohd Nor, representing the Director General of Insolvency) and Encik Sadacharam Raman who appeared as *amicus curiae* on behalf of the 1st defendant applied for an adjournment. Encik Zahari Mohd Nor, the Senior Federal Counsel, applied for an adjournment on the grounds, firstly, that the 1st defendant's application for sanction was still being processed by the Director General of Insolvency's Department, and, secondly, that he was in no position to proceed with the trial as the 1st defendant had failed to present himself at his (Senior Federal Counsel's) office and had not been cooperative. Encik Zahari disclosed to the court that the proper application for sanction was submitted by the 1st defendant to the Director General of Insolvency very late, that is to say, it was submitted only on 10 September 2007, just three days before the trial continuation date of 13 September 2007. And even then it was only submitted after a reminder had been sent by the Director General to the 1st defendant's solicitors, Messrs David Lingam on 20 July 2007. The Senior Federal Counsel added that apart from the pleadings he did not have the full set of documents pertaining to the case with him. Encik Sadacharam, on his part, applied for an adjournment on the grounds that the 1st defendant was still awaiting the Director General of Insolvency's sanction, and, secondly, the 1st defendant was unwell to attend court. Encik Sadacharam tendered a medical certificate which he said he received from the 1st defendant's office.

[7] The learned counsel for the plaintiff, Cik Tricia Mallika Appaduray, opposed the application for adjournment.

[8] I disallowed the application for adjournment and directed the trial to proceed.

[9] Now on that day (13 September 2007) the trial was to continue with the Senior Federal Counsel cross-examining the plaintiff's only witness. The Senior Federal Counsel frankly informed the court that he was ill-prepared for the case (for the reasons that I have mentioned earlier) and thus was in no position to cross-examine the witness. Counsel for the plaintiff then proceeded to re-examine the witness. That witness was the only witness for the plaintiff. The plaintiff then closed its case.

[10] The Senior Federal Counsel informed the court that he was in no position to proceed with the defence as the 1st defendant was on medical leave and that he had no other witnesses. Under the circumstances, I then deemed the trial as concluded and issued directions for the filing and serving of written submissions, and I fixed 4 February 2008 as the date of decision.

[11] Meanwhile, the receiving order and the adjudicating order against the 1st defendant were annulled by the Bankruptcy Court on 15 November 2007.

[12] Now, reverting to the present application, the following are my grounds for disallowing the 1st defendant's application.

[13] Firstly, the trial had already been concluded on 13 September 2007 and only awaiting decision of the court. At the continuation of the trial on 13 September 2007, the defence (the defendant then being the Director General of Insolvency, as the 1st defendant was still a bankrupt) did not call any witness. Subsequently, in accordance with the directions of the court given at the conclusion of the trial on 13 September 2007, written submissions by the counsel for the plaintiff as well as by the Senior Federal Counsel/Director General of Insolvency (who represented the 1st defendant at the material time as the first defendant was a bankrupt) had been filed and served. What only was left was for the court to deliver its decision on 4 February 2008. However, on 4 February 2008 the court did not deliver its decision because on that day, at the commencement of the proceedings, the learned counsel for the 1st defendant informed the court that the receiving order and adjudicating order against the 1st defendant had been annulled by the Bankruptcy Court on

15 November 2007, and that the 1st defendant now wished to apply to reopen the case, to cross-examine the plaintiff's witness, and, thereafter, to present the defendant's case.

[14] The broad principle as to how the court is to exercise its discretion in such a situation as the present is enunciated by the Court of Appeal in *Tan Kah Kiam v. Liew Chin Chuan & Anor* [2006] 4 CLJ 715. In this case, Gopal Sri Ram JCA, in delivering the judgment of the Court of Appeal, states:

> For temporarily speaking, whether the trial judge may exercise his discretion to permit the reopening of a party's case will very much depend on the stage at which the application is made. It may be more likely that a discretion may be exercised at the stage where the application is made immediately after a party closes its case. But it may be less likely that discretion will be favourably exercised where the application is made after the defendants have closed their case and just before the trial judge is about to pronounce his judgment. In the spectrum of factual possibilities that exist between each of these two extremes the exercise of discretion would, in my judgment, very much depend as to where the justice of the case lies having regard to the peculiar facts and circumstances before the court.

[15] In the present case, it is pertinent to observe that although the defence closed its case on 13 September 2007 and that the 1st defendant ceased to be a bankrupt on 15 November 2007, yet the present application was not made by the 1st defendant promptly: it was not made until 17 April 2008 when the present application was filed. No satisfactory explanation is furnished by the 1st defendant for this long delay in filing encl. 105. In para 20 of his supporting affidavit, the 1st defendant gives the reason for the delay in making the application as follows:

> 20. Jika terdapat apa-apa kelewatan dalam membuat permohonan ini (yang mana dinafikan), ia adalah disebabkan oleh masa yang diambil oleh saya untuk membatalkan Perintah-perintah Penerimaan dan Penghukuman terhadap saya dan seterusnya mengarahkan Peguamcara saya untuk membuat permohonan ini.

[16] The above cannot be the true reason for the delay because the 1st defendant obtained the annulment order from the Bankruptcy Court as early as 15 November 2007.

[17] Secondly, as can be seen from the notes of the evidence for the proceedings on 13 September 2007, the learned Senior Federal Counsel, representing the Director General of Insolvency, had informed the court that he was unable to proceed with the trial as the 1st defendant had not been cooperative and had never presented himself at the Senior Federal Counsel's office to discuss the case.

[18] Thirdly, the 1st defendant has shown no interest to proceed with the action. He was absent on 13 September 2007 without a valid reason. The trial was supposed to continue on that day. However, the 1st defendant on that day tendered a medical certificate. But I found the medical certificate tendered through counsel, Mr. Sadacharam Raman, who appeared as *amicus curiae*, wanting and hence unacceptable. As documentary evidence, the alleged medical certificate lacks credibility. Firstly, the medical certificate was not clear as to the nature of the 1st defendant's alleged illness. Secondly, the doctor who issued the medical certificate was not called to explain as to why the 1st defendant was unfit to attend court. Thirdly, the medical certificate itself does not say that the 1st defendant was not fit to attend court: for limb (c) of the medical certificate merely says:

> (c) Beliau tidak sihat untuk menjalankan tugasnya dengan sempurna pada/daripada 12/9/07 hingga 13/9/07 selama (Dua) hari.

[19] Fourthly, the medical certificate is ambiguous. To begin with, the 1st defendant seems to be relying on limb (c) of the medical certificate. But, importantly, limb (a) of the medical certificate says:

> (a) Beliau boleh menjalankan tugas,

[20] Now, it is significant to note that this limb (a) of the medical certificate, unlike limb (b) of the same, was not deleted by the issuing authority. Limb (b) reads:

> (b) Beliau boleh menjalankan tugas terhad, … (sila nyatakan) pada/daripada … hingga … selama … (…) hari.

[21] This limb (b) was deleted by the issuing authority. Now, if limb (b) of the medical certificate could be and was in fact deleted by the authority issuing the medical certificate, why wasn't limb (a) deleted as well? The fair inference to make is that the issuing authority had no intention of deleting limb (a). It then follows that

if the 1st defendant was 'fit to carry out his duties', then there was no reason for him to be absent from court! But if this is the case, how does one reconcile limb (a) with limb (c)!

[22] The 1st defendant in his supporting affidavit now states that he was unable to attend court on that day because he had a high fever. I am unable to accept this assertion because this was the first time that the court was informed of this reason. If indeed he was having a high fever on 13 September why didn't the doctor say so in the medical certificate in no uncertain terms; or, why didn't Mr. Sadacharam say so in court on 13 September? But in the first place why wasn't the medical certificate tendered through the Senior Federal Counsel who represented the Director General of Insolvency; why was it tendered merely through an *amicus curiae*? If indeed he was unfit to attend court on that day, and since on that day the 1st defendant was still a bankrupt, wasn't the Director General of Insolvency (or the Senior Federal Counsel) the appropriate person for the 1st defendant to inform and to hand over his medical certificate?

[23] But it is pertinent to note that it was not only on this date (13 September 2007) that the 1st defendant failed to attend trial without a valid reason. Previously the 1st defendant had absented himself from court on three occasions without a valid reason, although in respect of each of the occasions he had been previously informed in writing by the court to attend the court proceedings. The dates are 18 December 2006 (for continued hearing), 5 February 2007 (for mention), and 30 March 2007 (for continued hearing).

[Application dismissed with costs. However, on 10 October 2008, counsel for the 1st defendant was allowed to file and serve written submission on the trial as a whole, and decision on the whole trial would be delivered on 9 January 2009.]